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TABLE OF AUTHORITIES.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 984.

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION OF WESTERN ELECTRIC COMPANY, INCORPORATED FOR A WRIT OF CERTIORARI.

This short reply brief is directed solely to certain distortions of fact in the brief of counsel for the National Labor Relations Board submitted in opposition to our petition for certiorari, and to the attempts of counsel for the Board to evade the showing made in our petition and main brief that the case involves six important questions in the administration of the National Labor Relations Act and federal administrative law and clear conflicts on such questions between the decision of the majority of the court below and decisions of this Court and of other Circuit Courts of Appeals.

I. Distortions of Fact.

(a) The brief of counsel for the Board makes no mention of the pivotal finding of the Board itself (R., 74) that the Company's announcement of the termination of the employee representation plan became a matter of general

knowledge among the employees. Only through this glaring omission are counsel able to take the disingenuous position that there is no conflict between this case and *Labor Board* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594 (C. C. A. 7, 1944).

(b) Counsel state (Br. 4) that the Union was formed "for the avowed purpose of continuing the Plan system of conducting labor relations." There is not a line of testimony regarding any such "avowed purpose", and neither the Board nor the Court below so found.

(c) Counsel state (Br. 4) that "the structure of the Association retained the essential features of the Plan." But the Board itself found (R. 82-83) that the two principal features of the Plan, i.e., joint committees and Company financial support, were not present in the structure of the Union.

(d) Counsel state (Br. 4) that the Union's structure contained a "requirement that representatives must be employed in the voting district which they were to represent." But the evidence is uncontradicted that there was no such provision in the constitution or by-laws of the Union upon its organization in 1937, and that such a provision was inserted for the first time in 1942 and later rescinded, as Judge Soper in his dissent points out (R. 338).

(e) The repeated statements (Br. 5, 7, 8, 9) to the effect that the Company "permitted" employees to take certain actions is misleading and incorrect. The normal construction to be placed upon these words would indicate that the Company had some option and that it chose to allow these acts to take place. In fact, in most of such alleged instances, the Company was not aware of such actions until they had taken place. In any event, it could not legally have policed the activities of its employees or prevented them from doing the acts in question.

(f) The entire approach of counsel for the Board is on the theory of an *a priori* assumption of domination of the employees by the Company. However, the undisputed testimony is that no employee voted for the Union because he thought the Company wanted him to do so (Typewritten testimony, p. 147).

The distortions just mentioned cannot obscure the uncontradicted evidence that the Company announced the termination of the employee representation plan and its indifference to organizational activities of the employees, that this announcement was passed on to the employees by the former employee representatives under the plan and became a matter of general knowledge among the employees, that an organizing committee elected by the employees by secret ballot drafted the constitution and by-laws of the Union without any advice, assistance or interference by the Company, that the Union was subsequently selected by the employees as their bargaining agent by an overwhelming secret vote, and that the Union is in fact independent of, and aggressive towards, the Company.

II. Evasion of the Issues.

We proceed to mention briefly the principal respects in which the brief of counsel for the Board fails to meet the reasons advanced in our petition and main brief for the allowance of the writ.

(1) The conflicts between the decision in this case and the decisions of other Circuit Courts of Appeals.

(a) The plain conflict between the decision in this case and the decision in the Seventh Circuit in the *Duncan Foundry* case as to the sufficiency of the Company's announcement cannot be conjured away by the statement (Br. 16) that each of the cases turns "upon its own particular facts." Actually the "particular facts" regarding the method of giving notice in the instant case are identical with those of the *Duncan Foundry* case and, as we have

shown in detail in our petition and main brief (pp. 8-9, 23-29), were held in that case to be sufficient. The only difference is that in the case at bar the Board itself made a specific finding that the Company's announcement became a matter of general knowledge among the employees (R., 74), a finding which it had not made in the *Duncan Foundry* case.

To say, as counsel for the Board say here, that knowledge actually obtained by the employees is insufficient because it was not obtained in a particular manner is definitely to sacrifice substance to form and to require the use of some "formal mechanical pattern."

(b) Counsel for the Board make no attempt to deny that, as our petition and main brief showed (pp. 9, 29-30), the decision of the majority in the court below is in conflict with at least six decisions in the Seventh and Fifth Circuits, in that the majority below endorsed reliance by the Board, as evidence of domination, on organizational activities of the employees themselves, as to which it is not claimed that the Company advised, assisted or interfered. Counsel's mere evasive reference (Br. 16) to their contention that the employees "were never freed from the coercive effects of the Company's prior domination of the Plan" is ineffectual as a means of turning aside these decisions, since it assumes the very point to be proved.

The contention of counsel also seems to be that the Company was required to police and interfere with the organizational activities of the employees, a position contrary to express provisions of the Act, and in support of which, obviously, no authority is cited.

(c) Similarly, counsel for the Board make no attempt to deny that, as shown in our petition and main brief (pp. 10, 31-2), the decision below is in conflict with decisions in the Ninth, Eighth and Seventh Circuits in that the majority of the court below endorsed reliance by the Board, as evidence of domination, on the fact of performance by the Company of its legal duty under the Act of recognizing a

committee elected by the majority of the employees as their bargaining agent. Nor do counsel discuss or distinguish the decisions cited in our main brief (p. 31) on this point.

(d) Also, counsel for the Board in no way indicate how the force of the decisions in the Second, Third and Fifth Circuits cited in our main brief (pp. 33-4) can be turned aside in such a way as to eliminate the clear conflict between them and the decision in this case on the issue of the propriety of the Board's reliance on alleged incidents involving only seven non-supervisory employees out of over 5,000 and only six supervisory employees, at the lowest levels, out of over 400, particularly when, so far as such incidents involved expressions of views, they are protected by the constitutional guaranty of freedom of speech.

It is no justification of these evasions to say, as counsel for the Board do (Br. 10-11), that the Board decided this case upon an aggregate of facts. Mere aggregation of facts upon which the Board could not legally rely cannot properly constitute a basis of administrative action. We submit also that where the Board and the court below have relied upon an aggregation of facts, the demonstration of the legal invalidity of any item invalidates the ultimate conclusion; *a fortiori,* where a substantial number of the most important items have been shown to be without legal significance.

(2) Reliance by the court below on grounds not relied on by the Board, including facts not even found by the Board to have occurred.

In their argument (Br., 11-13), counsel for the Board attempt to answer our point regarding this important matter of administrative law (a) by minimizing the matters relied on by the majority below in their opinion, which were not relied on by the Board, and (b) by taking the untenable position that the same rule is applicable to the review of decisions of administrative bodies as is applicable to review of decisions of a lower court, namely, that

the decision of an administrative body may be supported on grounds not relied on by the administrative body itself.

(a) We do not believe that counsel for the Board will succeed in minimizing these matters in the eyes of this Court in view of the emphasis upon them in the opinion of the majority below. Two of the matters (*i. e.*, the asserted belief of the employees that the Company desired an independent union and the alleged swift grant of a check-off, wage increase, etc.) were among the seven important points stressed by the majority of the court below in their summary of the facts which they thought support the Board's conclusion (R. 331)*. A third (the non-existent conversation between employee Mileski and plan representative Schmidt) was used by the majority of the Court below as the basis (R. 326) for their crucial conclusion (R. 331) that the Company's announcement of termination of the plan and indifference to organization activities of employees was second-hand and equivocal.

The majority below, in supporting the conclusion of the Board, also laid stress (R. 330) on two additional matters not found by the Board to have occurred, namely, the alleged incidents involving Leichsenring and Mercer (Our main brief, 16). These matters had been ruled out by the Trial Examiner as not supported by any "substantial credible evidence" (R. 59), and the Board had concurred.

(b) In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943), this Court clearly laid down the rule that in the review of the action of administrative agencies, the action of the agency will not be sustained unless the grounds upon which the agency acted are clearly disclosed and adequately sustained by its own findings. In so holding, this Court expressly pointed out that the rule so applied is different from that which obtains

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* Counsel imply (Br. 11-2 *fn*) that the Board made findings on these matters. A glance at the "findings" to which counsel refer will show that they in nowise controvert the points made in our main brief (pp. 15-6).

in the review of the decisions of judicial tribunals, where the decision of the lower court will be affirmed if the result is correct although reached upon a wrong ground or for a wrong reason. For the rule applicable to the review of judicial tribunals this Court cited *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937), which is relied on here by counsel for the Board (Br. 13), and expressly distinguished that decision.

The principle applicable to the review of the action of administrative agencies set forth in the *Chenery Corporation* case has been uniformly applied by this Court to the actions of other administrative agencies generally, including the Board (*Labor Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 478-80 [1941]; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 195-7 [1941]). Counsel for the Board give no reason why that principle is not applicable to the present case. If and to the extent that the two circuit court of appeals cases cited by counsel for the Board (Br. 12) conflict with such principle, these decisions were erroneous and constitute no precedent in this Court.

(3) Failure by the Board to review and appraise substantial undisputed evidence that the Union is independent and militant and not dominated by the Company.

In our petition and main brief (pp. 7-8, 18-23) we showed that the Board failed to review and appraise substantial undisputed evidence, including the report of a panel of the War Labor Board, that the Union was independent and aggressive and not dominated by the Company, although required to do so under the principles enunciated by this Court in *Labor Board* v. *Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50 (1943), and in other cited decisions of this Court.

Counsel for the Board state (Br., p. 14) that the findings in the present case were in this respect more complete than those made by the Board in the *Southern Bell* case and that this Court accepted such lesser finding

of the Board in that case. This statement by counsel is simply incorrect. An examination of the Board's report in the *Southern Bell* case shows that in the "Concluding Findings" (35 NLRB 637-40, at pp. 638-9) the Board reviewed the evidence introduced on this point in that case and expressly found that such evidence did not overcome the original and continued active domination of the organization there involved. There is no corresponding review and appraisal to be found in the Board's report in this case. The so-called "findings" referred to by counsel for the Board (Br., p. 14) as satisfying the requirements of the *Southern Bell* decision are not findings at all but conclusions of law based entirely upon events of 1937, as we showed in our main brief (pp. 19-23).

Counsel for the Board do not claim in their argument (Br. 13-15, and footnotes) that there was any evidence of actual present domination. They state that the Company's contention that the Board failed to review and appraise the very substantial evidence of present independence is incorrect and that the Board's decision "contains a full discussion of the Association's bargaining activities, including proceedings before the War Labor Board (R. 84-85, and note 23)". In fact, the Board's decision does not contain an appraisal of these two matters. Nor does it as much as mention the other substantial undisputed evidence of independence of the Union, including (1) the report of the panel of the War Labor Board showing the Union to be independent and militant (classed by Judge Soper [R. 342-3] as the clearest evidence of complete independence of the Union), (2) evidence regarding the radical changes in the personnel at the plant and in the membership of the Union over the six-year period involved, and (3) evidence regarding the sturdy nature of the organization of the Union at the time of the hearing.

Conclusion.

It is plain that there are serious conflicts between the present decision and the decisions of this Court and of other Circuit Courts of Appeals on matters of great importance in the administration of the Act and federal administrative law.

The petition of the Company for a writ of certiorari should accordingly be granted.

Respectfully submitted,

R. Dorsey Watkins,
Wilkie Bushby,
William J. Butler,
Walter L. Brown,
Carl K. Rang,
Counsel for Petitioner.

March 28, 1945.